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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY ANDREW HALL,

Defendant and Appellant.

B210907

(Los Angeles County
Super. Ct. No. BA 340006)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Affirmed in part; reversed in part and remanded.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Gregory Andrew Hall appeals from the judgment following a jury trial in which he was convicted of petty theft with a prior qualifying theft conviction, a felony. Appellant contends his felony sentence must be vacated and the matter remanded to the superior court for further proceedings to address the issue of prior convictions because (1) the trial court never accepted his admission of a prior conviction; (2) the predicate service of a prior term of imprisonment for theft thus was never addressed or established; and (3) there was no showing appellant was advised of the consequences of admitting a prior conviction. Respondent concedes that a remand is necessary for the trial court to complete the taking of admissions to the priors or to conduct the bifurcated trial on that issue as the matter remains adjudicated. We affirm the judgment of conviction and remand for further proceedings as to the prior conviction allegations.

FACTS

In May 2008, appellant went to a Jons supermarket on 8th Street in Los Angeles. Appellant entered the store with a jacket over his arm. He removed a black plastic bag from an inside pocket of the jacket and went to the coffee aisle. He placed six jars of coffee in the bag. Then, with the jacket draped over the loaded bag, he walked through a handicap gate past several cashiers and left the market without paying for the coffee. Appellant was observed by a loss prevention agent employee, who identified himself and stopped appellant outside the store. Appellant pushed the loss prevention agent. He threw the plastic bag containing the coffee back into the store, and a struggle ensued. The loss prevention agent eventually handcuffed appellant with the assistance of another agent, and appellant was taken to the store's office. Police were called, and they arrested appellant.

PROCEDURAL HISTORY

Appellant was charged with one count of petty theft with priors under Penal Code section 666.¹ For the prior conviction and prior incarceration requirement, the information alleged that appellant was previously convicted for theft offenses on August 5, 1999, April 6, 1998, and April 21, 1997, and he served a term in prison for each conviction. It was

¹ All further statutory references are to the Penal Code.

also alleged he suffered two prior felony convictions, which could make him ineligible for probation.

Appellant pleaded not guilty, and the case proceeded to a jury trial.

After the close of evidence, appellant expressly waived a jury trial of the prior conviction allegations through his counsel, as follows.

The court inquired of defense counsel, “is your client willing to waive jury on the trial of the priors?” Counsel replied, “Yes. [¶] What priors are being alleged, do you know?” The court indicated the priors were listed in the information, and the prosecutor stated, “[t]here’s alleged on the information . . . a [section] 666 in 1999, a [section] 484 in 1998, and a [section] 484 in 1997.” Defense counsel said, “[i]t is my understanding that for clarification of my client, any one of those could be used” The court confirmed that was the case. After conferring with his client, defense counsel stated “yes, he’ll waive. He’ll waive it, Your Honor.”

The court then asked the prosecuting attorney to “take the waiver of the jury trial on the prior.” The prosecutor informed and inquired of appellant, “with regards to the priors, you do have a right to have a jury . . . determine whether you have been convicted of any of the priors alleged on the information. That means that you would have the right to cross -- your attorney would have the right to confront and cross-examine witnesses, you would have the right to present a defense, and of course, you have the right to remain silent as to these priors. [¶] Do you understand those rights and give up the right -- those rights, and agree that the court can make the determination as to the priors alleged in the information?” Appellant raised a nonrelated issue, which prompted the court to instruct defense counsel to confer with his client. After appellant and his counsel conferred, appellant answered, “Yes, yes.” Defense counsel said, “Okay. He will admit the priors.”

At the court’s request, the prosecuting attorney continued with the advisement, saying, “Now that you have had an opportunity to confer with your attorney, should you be convicted of this offense, do you understand the rights that I just told you and give them up?” Appellant answered, “Yes.” The prosecutor continued, “and agree that the judge can determine those priors?” Appellant responded, “Yes.”

The prosecutor then asked appellant if he wished to admit those priors “at this time,” and he responded, “Yes.” However, when the prosecutor attempted to obtain appellant’s admissions, appellant displayed confusion over the charged priors.²

² The following exchange occurred:

“[Prosecutor]: Do you admit that you were convicted in case number BA183454 on August 5th, 1999, of violating . . . section 666 in the Los Angeles Superior Court?

“[Appellant]: Yes.

“[Prosecutor]: And do you admit that you were convicted of violating . . . section 484(a) on April 4th, 1998, in case number 8CR23572 in San Bernardino Superior Court?

“[Appellant]: Impossible. I was in prison. No.

“[Defense Counsel]: Does he have to admit more than one of them?

“[Appellant]: That’s impossible on that one. Not in San Bernardino, no.

“[Prosecutor]: So no, you are not admitting that?

“[Appellant]: I wasn’t. That’s something else.

“[Prosecutor]: Is that a ‘No’?

“[Appellant]: I already said ‘no’ three times.

“[Prosecutor]: Thank you. [¶] Do you admit that you were convicted of . . . section 484(a) in case number CR00148 on April 21st, 1997?

“[Appellant]: Is that the one you just said earlier? ’97?

“[Prosecutor]: No. This is a different one.

“[Interruption by audience member and court admonishes court audience.]

“[Appellant]: Let me see.

“[Defense counsel]: One was on August 5th, 1997 [*sic*].

“[Appellant]: August 5th, 1997 [*sic*]. [¶] The other one was what?

“The Court: April 6, 1998, and the third one is April 21, 1997.

“[Appellant]: 1998 isn’t mine, because in ’98 I was incarcerated for that petty theft. So I’m thinking that the one she said in ’97, that’s the one I was incarcerated for.

“The Court: Well, the petty theft was in 1999.

“[Appellant]: I was incarcerated in ’99. That’s what’s confusing.”

At that point, “[r]ather than take the admissions now,” the trial court instructed the prosecuting attorney to have “the packet of the priors packages” for the following Monday for review by defense counsel and his client to “make the determination as to whether or not they’re valid.” The court declared that “in any event, [appellant] has waived jury trial, and at a minimum, . . . if there is a trial, it will be a trial to me on the packet, same packages.”

The jury found defendant guilty of the crime of petty theft in violation of section 484, subdivision (a), as charged.

Several weeks later, at a subsequent hearing, the prosecutor informed the trial court, “it is my recollection that [appellant] did admit his prior conviction.” The court inquired of defense counsel whether that was his recollection, and counsel stated that it was. After giving appellant an opportunity to be heard and hearing from defense counsel, the court imposed sentence. The court stated that because appellant had “previously admitted” the three charged prior convictions, it would strike the punishments for enhancements resulting from the priors. However, in light of appellant’s prison record and the nature of the present crime, which included a physical altercation initiated by appellant, the court denied probation. The prosecution in its sentencing memorandum requested the midterm of three years in state prison. The court selected the low term of 16 months stating the value of the items taken was small, and appellant had no felony convictions in nine years. The court awarded custody credits and ordered appellant to pay various fines and fees.

Appellant timely appealed the judgment of conviction.

DISCUSSION

In *Boykin v. Alabama* (1969) 395 U.S. 238, the United States Supreme Court held that when a defendant voluntarily enters a guilty plea, the trial court must affirmatively establish the defendant is aware of the constitutional rights he or she is waiving. (*Id.* at pp. 242-244.) Such rights include the right against self-incrimination, the right to a jury trial and the right to confront one’s accusers. (*Id.* at p. 243.) In *In re Tahl* (1969) 1 Cal.3d 122, our Supreme Court extended the *Boykin* rule by requiring that the three rights must be “specifically and expressly” enumerated and waived by the defendant prior to acceptance of his or her guilty plea. (*In re Tahl, supra*, 1 Cal.3d at p. 132.) The Supreme Court

subsequently extended the *Boykin/Tahl* requirements to a defendant's admission he or she has suffered a prior conviction charged in the information. (*In re Yurko* (1974) 10 Cal.3d 857, 863.) In *People v. Mosby* (2004) 33 Cal.4th 353, the court relaxed this standard in holding a defendant's admission of a prior conviction may be found "voluntary and intelligent" so long as the "totality of circumstances surrounding the admission" supports such a conclusion. (*Id.* at pp. 356, 361.)

In the instant case, before voir dire, the allegations of the prior convictions were bifurcated at appellant's request from the issue of guilt. In the course of trial, after both sides had rested, the parties stipulated to waive a jury trial on the issue of prior convictions, and the issue of guilt alone went to the jury. The jury found defendant guilty of the crime of petty theft in violation of section 484, subdivision (a), as charged.

Afterwards, the trial court only began to take admissions from appellant as to the fact of his prior convictions. Although appellant initially admitted the August 5, 1999 conviction, he expressed confusion about that conviction moments later, stating he believed he was already incarcerated by 1999. Appellant's obvious confusion over whether he suffered the August 5, 1999 prior conviction does not support any inference his admission to that conviction was "voluntary and intelligent" under the "totality of the circumstances" shown by this record. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.) Moreover, when appellant began to express confusion, the court expressly aborted any taking of admissions, stating that "rather than take the admissions" at that time, the prosecutor should have the "priors package[]" ready at the next court date for appellant and his counsel to review and to determine the validity of the prior convictions.

Several weeks later, at the sentencing hearing, the trial court relied on the attorneys' mistaken recollection that an admission had taken place. The record reflects no other court proceeding in which the court took appellant's admission of a prior conviction.

Because appellant never admitted the fact of his prior conviction and incarceration, no bifurcated adjudication occurred of the issue. The allegations as to appellant's prior convictions remain to be tried or admitted. The sentence the trial court imposed based upon its belief that the admissions had been taken is legally unauthorized and must be reversed.

(*People v. Miller* (2008) 164 Cal.App.4th 653, 668.) Double jeopardy protections, however, are not applicable to the trial of prior conviction allegations. (*People v. Monge* (1997) 16 Cal.4th 826, 845; *Miller, supra*, at p. 668.) Therefore, we must remand the case for further admissions or a court trial on the prior conviction allegations and for resentencing. (*Miller*, at p. 668; see *People v. Walker* (2001) 89 Cal.App.4th 380, 387.)

DISPOSITION

The sentence and order striking the allegations of prior convictions are vacated, and the case is remanded to the trial court with directions to either complete the taking of admissions or conduct a new trial on the truth of the prior convictions allegations and to take such further actions as are appropriate. The trial court should properly advise appellant of the consequences of admitting a prior conviction prior to taking an admission. In all other respects, the judgment is affirmed.

FLIER, Acting P. J.

We concur:

BIGELOW, J.

MOHR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.